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IN THE

Supreme Court of the United States

October Term, 1941

No. 1182

LOUIS N. ROSENBAUM, *Petitioner*

against

FREDERICK BROWN

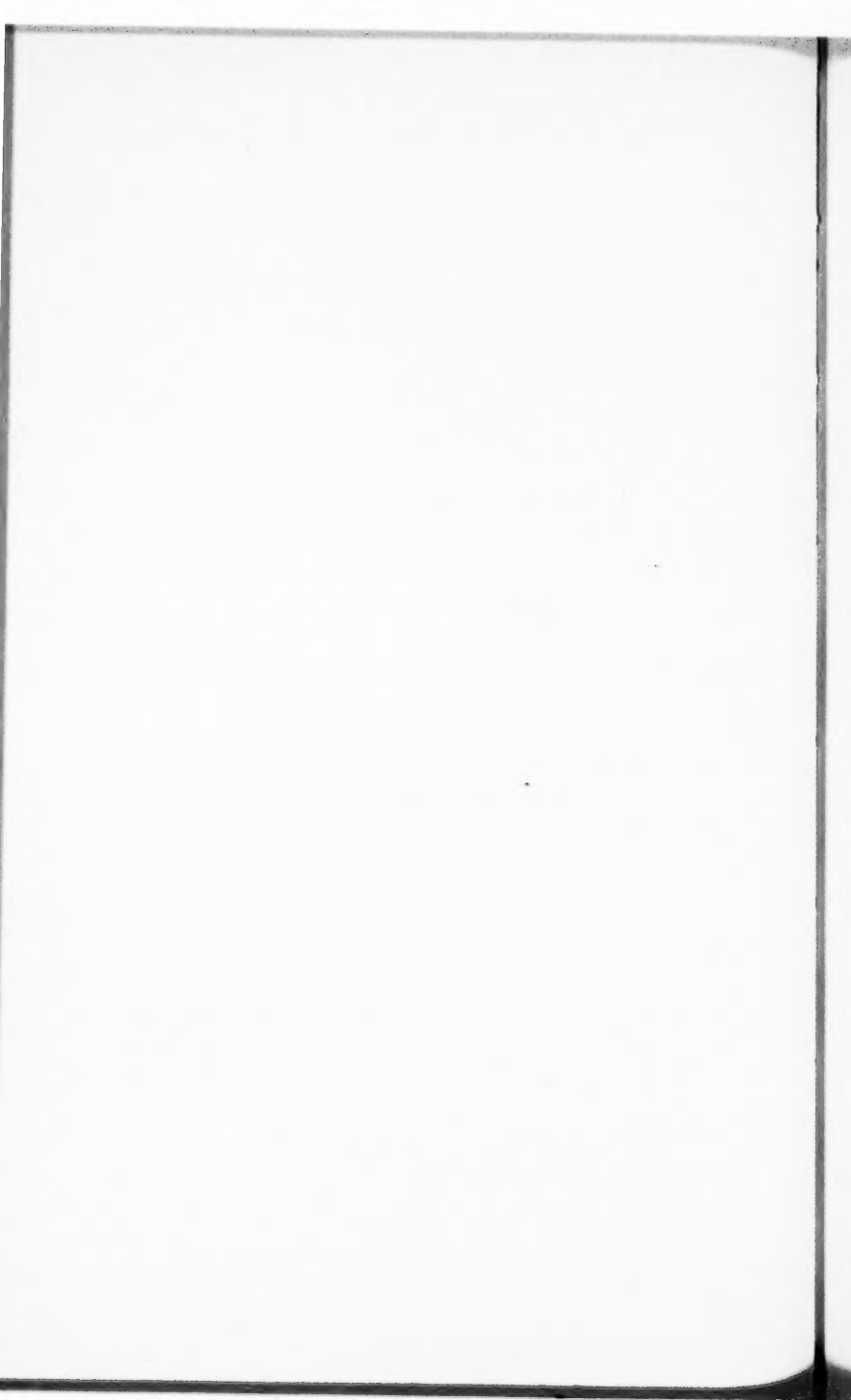
**Petition of Louis N. Rosenbaum
for Writ of Certiorari to the Supreme Court of the
State of New York, County of New York; and
Brief in Support Thereof**

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POINT I—Since the Harriman Bank was hopelessly insolvent on March 3, 1933, and never thereafter met its regular banking obligations, and since the Comptroller took it in charge on that date through an examiner, the subsequent continuance of the Comptroller's control by appointment of a conservator was merely an administrative recognition of the true nature of the suspension in the case of the Harriman Bank. As of that date, not only the rights of creditors but also the obligations of debtors (including stockholders under assessment) became and have been fixed.

Hence, inasmuch as the defendant did not contract to buy stock of the Harriman Bank until some days later, he was not assessable under the Federal Statute and could not be liable to indemnify Blumenthal 8

POINT II—Moreover, the Treasury Department itself fixed the sixty-day period for assessment as terminating on March 3, 1933.

The force of that decision and of that practical construction is obvious, and our State Court of Appeals had no power to modify it or to fix a different period 11

- POINT III—Indeed, the Treasury Department not only fixed March 3, 1933, as the termination of the sixty-day assessment period for the Harriman Bank, but it made a general ruling that, as to any bank which failed to reopen because of insolvency on the date of the Gubernatorial or Presidential Proclamation, such date should be deemed the official date of closing as of which the basic deficiency should be calculated and the respective rights and obligations of the creditors and the debtors (including shareholders) should be deemed fixed 14
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POINT VII—The State Court of Appeals was also in error, we submit, in holding that the Federal statute imposed on the “ultimate transferee” “a primary duty to meet the liability,” and in holding that an ultimate purchaser who was not even a stockholder of record was liable in law to indemnify a prior holder with whom he had no relationship either of privity or of quasi-trust.

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No.

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against

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**Petition of Louis N. Rosenbaum
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Brief in Support Thereof**

*To the Honorable Harlan Fiske Stone, Chief Justice of the
United States, and the Associate Justices of the
Supreme Court of the United States:*

The petition of Louis N. Rosenbaum, a citizen of New York, respectfully shows:

Your petitioner seeks review of a determination of the Court of Appeals of the State of New York (287 N. Y. 510) on March 5, 1942, affirming a judgment directed (one judge dissenting) by the Appellate Division, First Department, of that State, in favor of Frederick Brown as plaintiff against Louis N. Rosenbaum (the petitioner herein) as defendant, for the sum of \$13,491.02. The latter judgment reversed the judgment of the Trial Term, New York County, dismissing the plaintiff's complaint on the merits.

The Court of Appeals remitted the record to the Supreme Court of the State, County of New York; and this latter court on March 12, 1942, entered a judgment making the determination of the Court of Appeals its judgment.

Federal Statute Involved

The judgment was predicated on a construction of the federal statute which imposes individual liability for assessment against stockholders of national banks. (Dec. 23, 1933, c. 6, § 23, 38 Stat. 273, 12 U. S. C. A. § 64.) It reads as follows:

“Individual liability of shareholders; transfer of shares.

“The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability, but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure.”

Nature of the Action

This is an action at law. It is brought to enforce an alleged liability of the defendant to pay to the plaintiff the sum paid by the latter's assignor (Blumenthal) in satisfaction of an assessment levied against him as a stockholder of record in the Harriman National Bank within sixty days prior to its failure to meet its obligations.

The Harriman National Bank was, as is conceded in the Record (fol. 973), insolvent “by a large sum” on

Friday, March 3, 1933. It never opened after the close of business on that day. A Conservator was appointed for it on Monday, March 13, 1933, by the Controller of the Currency. A Receiver was appointed on October 16, 1933.

Within sixty days prior to March 3, 1933, Blumenthal sold his stock in the bank. Thereafter, but prior to March 3, 1933, this stock went through several transfers of record upon the books of the bank.

On March 6, 1933, three days after the bank closed its doors never to open again, the defendant Rosenbaum placed with a broker an order to buy 92 shares of its stock. No shares of stock were delivered to him personally until April 11, 1933 (R. p. 411, Ex. 33); but the Appellate Division and the Court of Appeals held that 86 of these shares were allocated and delivered to his agent on or before Saturday, March 11, 1933.

On March 3, 1933, Governor Lehman of New York by proclamation "closed" all banks, thus suspending banking transactions throughout the State on Saturday, March 4 and Monday, March 6, 1933 (fol. 1057). At 1:00 A. M. on March 6, 1933, the President of the United States by proclamation "suspended" "all banking transactions" throughout the country (see Pl. Exs. 9 and 10, pp. 353-386). The President's action permanently closed every bank and suspended its operations unless and until it received "a license to reopen for the performance of all usual and normal banking functions" (fols. 1147-9, 1153, 1059, 1079).

The Secretary of the Treasury immediately began an investigation of the affairs of the Harriman Bank as of March 3, 1933, through an examiner then placed in charge (fols. 1263-4, 955, 961-4, 972-3, 991-2, 88-9, 133, 1066-7). The examiner speedily discovered that as of that date the bank was insolvent "by a large sum" (fols. 972-4). Accordingly, the bank received no license and remained closed. The suspension of its regular banking operations on March 3, 1933, including, of course, the meeting of its regular banking obligations, was permanent.

On November 13, 1934, the Controller of the Currency made an assessment and requisition against stockholders of the Harriman National Bank who were such on *March 3, 1933* or within sixty days prior thereto (fols. 88-9, 132-3). Under this assessment Blumenthal paid \$10,238.28.

On the ground that the defendant was, within the sixty days contemplated by the statute, the owner of 92 of the shares of stock which Blumenthal had transferred to others within that period, the plaintiff, as Blumenthal's assignor, brought this action at law to recover from the defendant the assessment paid by Blumenthal so far as it covered these 92 shares (fol. 17).

The Appellate Division and the Court of Appeals granted the plaintiff a judgment as to 86 of these shares (262 App. Div. 136; 287 N. Y. 510).

The Federal Questions Involved

The Trial Court held: (1) that under the Federal Statute the 60-day period terminated with March 3, 1933 (fols. 1313-20), and (2) that, even were this otherwise, nevertheless under the Federal Statute there was no obligation on the defendant to indemnify Blumenthal, since there was no quasi-trust relationship between them (fols. 1296-1302) (175 Misc. 295).

The Appellate Division by a divided Court took the contrary view on both points (fols. 1366-85) (262 App. Div. 136). So, also, did the Court of Appeals of the State.

The Court of Appeals said (287 N. Y. 510, 515):

"Two questions of law remain, which must be decided upon this appeal: *First*. Was the date of the bank's failure 'to meet its obligations,' at which time the statutory liability of stockholders attached, March 3, 1933, before the defendant purchased his stock, or March 13th, after the stock was delivered to defendant? *Second*. May a stockholder who has transferred his stock within sixty days before the date of the fail-

ure of the bank to meet its obligations and who, for that reason, has been compelled to pay a judgment recovered against him in an action brought to enforce the statutory liability imposed on stockholders of banking associations, maintain an action for reimbursement against the stockholder who had become the owner of the stock at the date of such failure through delivery from persons to whom it had been previously transferred?"

The Court of Appeals then reviewed the proclamation of the President, the interpretation and application of the Federal Statute, the effect of the Comptroller's fixation of the 60-day period as terminating March 3, 1933, and various Federal decisions by this and other Federal Courts.

Concerning the first point the Court of Appeals concluded that under the Federal Statute (p. 517):

"The date of such failure ('to meet its obligations') arrives only when a bank fails to open or refuses to meet its obligations which then have matured though other banks are open and carrying on their business without restriction. The Comptroller of the Currency is not charged with responsibility to fix that date. It is fixed according to statute by an act of default, not by an act of insolvency, and the courts must determine when such an act has occurred. Here, it is shown, as matter of law, the act occurred on March 13, 1933, and that date cannot be altered by any administrative ruling."

As to the second point the Court of Appeals said (p. 520):

"Unlike the New York statute the federal statute imposes liability for the same obligation upon persons between whom there may be neither privity of contract nor privity of estate, and here the plaintiff asserts that as between these persons the beneficial owner of the stock at the date when liability attached should have discharged the obligation. * * * The stat-

ute clearly indicates that Congress intended that the ultimate transferee should be under a primary duty to meet the liability for all other persons who were made subject to the liability only to the extent that such transferee failed to meet it."

Reasons for Allowance of Writ

The writ of certiorari should be granted:

(1) To settle the interpretation of the Federal statute as to the time when the 60 day assessment period terminates where a bank ceases regular banking operations and because of insolvency on that date never resumes.

(2) To settle the interpretation of the Federal statute as to whether such statute (as held by the Court of Appeals) does in fact contemplate that the primary obligation to pay the assessment is on the beneficial holder at the end of the 60 day period, and that he must indemnify a prior holder, notwithstanding that there have been several intervening transfers of record before such beneficial owner acquired his interest.

(3) To settle the conflict which the Court of Appeals itself avowed (287 N. Y. 510, 517-8) between its decision and the action of the Comptroller of the Currency in fixing March 3rd as the end of the 60 day assessment period. Obviously the decision of the Court of Appeals invalidates any assessments levied by the Comptroller on stockholders who were, but ceased to be, such within the first ten days of the period fixed by him.

(4) To settle the conflict (as we see it) between the decision by the Court of Appeals and the decisions by this Court and certain other Federal courts cited in the accompanying brief.

(5) Conceding, as apparently does the Court of Appeals (p. 516) and as numerous decisions by this Court and other Federal courts conclusively decide, that the rights of creditors must be deemed frozen as of the closing and accompanying insolvency on March 3, 1933, is the fixation of the obligations of the stockholders as debtors to be as of some other and later date?

These questions are of general importance not only to the great body of litigation which grew out of the wholesale bank failures of 1933, but also to the future administration of this Federal statute.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of the State of New York, County of New York, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings in the case entitled Frederick Brown, Plaintiff, against Louis N. Rosenbaum, Defendant, and that the determination of the Court of Appeals of the State of New York and the judgment thereon may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just;

And your petitioner will forever pray.

Dated, April 24, 1942.

Respectfully submitted,

LOUIS N. ROSENBAUM,
Petitioner,

By CHARLES H. TUTTLE,
Of Counsel.